categorical statement that demand for rent was made monthly at the premises. It was not challenged in cross-examination, hence dispensing with the brother being called to prove a fact which the defendant had made no attempt to deny.

In the third place, the defendant should not have been heard on the new ground raised for the first time on appeal. As Lord Herschell said in *The "Tasmania"*:—[1]

"I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.

It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

It is not at all surprising that this new ground was the only one raised by counsel at the appeal, because on no other ground could the judgment of the learned magistrate have been attacked. Indeed, I am sure that counsel was well aware that a similar defence had failed in *Leong Hoi Kow* v. *Chan Ho Yat*.[3]

I would therefore allow this appeal and affirm the order of the magistrate, with costs here and in the courts below.

Barakbah L.P. concurred.

Appeal allowed.

Solicitors: *Peh Swee Chin; Dharmananda & Co.*

NG HOI CHEU & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) August 16, 1967]

[Penang — Criminal Appeal No. 37 of 1967]

Criminal Law and Procedure — Appeal — Finding of fact — Credibility of witnesses.

Evidence — Statement from the dock — Addressing court — Failure to afford accused or his counsel opportunity of — Irregularity — Criminal Procedure Code (S.S. Cap. 21), s. 448.

When there is an appeal against a finding of fact, depending on the credibility of the witnesses, and no reason being advanced that such finding was wrong having regard to the evidence, the appellate court would have no hesitation in dismissing the appeal.

A statement from the dock is evidence, for what it is worth but nevertheless evidence which thereafter entitles the accused or his counsel to address the court. Failure to afford accused or his counsel an opportunity to address the court is a serious irregularity entitling the accused to a retrial. The irregularity is, however, curable under section 448 of the Criminal Procedure Code (S.S. Cap. 21) where counsel for the defence had previously made an address to the court in the same case and if he had not been shut out, he would have quite clearly merely repeated his address. There being no failure of justice having been occasioned in this case the appeal was dismissed.

Wong Heng Fatt v. *Public Prosecutor* [1] dissented from.

Cases referred to:—

(1) *Wong Heng Fatt* v. *Public Prosecutor* [1959] M.L.J. 20.

(2) *Lam Heng* v. *R.* [1937] M.L.J. 154.

(3) *Mahinder Singh* v. *Public Prosecutor* [1941] M.L.J. 230.

MAGISTRATE'S CRIMINAL APPEAL.

David Choong for the appellant.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: The appellants were in the sessions court at Penang charged with the following two charges:—

"First Charge:

You are jointly charged that you on 8.12.65 at about 8.50 p.m. in the sea off Pulau Kendi, Penang were knowingly concerned in conveying dutiable goods, to wit, 11 bundles textiles in an un-numbered motorised sampan with intent to defraud Government of the duties thereon amounting to $1 340.40 thereby committing an offence under section 131(1)(e) of the Customs Ordinance 42/52 and punishable under section 131(1) of the same.

Second Charge:

You are jointly charged that you on 8.12.65 at about 8.50 p.m. in the sea off Pulau Kendi did carry in a local craft, to wit, an un-numbered motorised sampan goods of a class dutiable on import, otherwise than with the permission of the Comptroller General, contrary to section 47(1) and punishable under section 134 of the Customs Ordinance 42/52."

At the close of the case for the prosecution and after submission by counsel for the appellants and by the prosecuting officer, they were acquitted and discharged on the 1st charge but were called upon to make their defence to the second charge. Thereupon, on the advice, as stated by them, of their counsel, they pleaded guilty to the 2nd charge. They were convicted and fined.

Their acquittal on the 1st charge was set aside by Ong Hock Sim J. and the case was remitted to the president, sessions court for him to call upon the defence.

The facts were few. The appellants were on the night in question found in an un-numbered motorised sampan conveying 11 bundles of textiles off Pulau Kendi between the Island of Penang and the mainland which is the principal customs area. It is alleged by the customs officer that the sampan was headed towards the

mainland. When the defence was called, the appellants made a statement from the dock, averring that they were headed towards Pulau Kendi, where they were to dump the textiles for smuggling into Indonesia. No witnesses for the defence were called. This defence, such as it was, was duly considered by the learned president, sessions court, and for reasons, which to my mind were entirely cogent, was rejected by him. They were then convicted and sentenced to the minimum fine of $5,000.

The appeal against conviction was urged entirely on the ground that the learned president, sessions court, had not given due weight to the defence allegation that the sampan was going to Pulau Kendi and not to the mainland. It was an appeal against a finding of fact, depending on the credibility of the witnesses, and no reason being advanced that such finding was wrong having regard to the evidence, I would have no hesitation in dismissing the appeal.

However, it appeared on the record and it was confirmed by a statement from the bar, which I accepted, that counsel for the appellants made no submission at the close of the case for the defence. He had attempted to do so, but was prevented by the learned president, sessions court, for the reason that since the accused had merely made statements from the dock, they had not given any evidence, and their counsel was therefore not entitled to address the court, having regard to the provisions of section 184 of the Criminal Procedure Code (S.S. Cap. 21).

In ruling thus, the learned president, sessions court, was clearly following the decision of Smith J. in *Wong Heng Fatt* v. *Public Prosecutor* [1] which he, quite understandably, felt was binding on him.

In coming to his decision, Smith J. relied on the provisions of section 4(1)(a) of the Oaths and Affirmations Ordinance 1949 for the administration of oaths and affirmations to witnesses, and he accordingly held that since the accused in making a statement from the dock was neither sworn nor affirmed, he had not given any evidence.

With all respect, I find myself unable to agree. Section 4(1)(a) reads as follows:—

> "Subject to the provisions of section 5 of this Ordinance, oaths shall be taken by the following persons —
>
> witnesses, that is to say, all persons who may be lawfully examined, or give or be required to give evidence, by or before any court or person having, as mentioned in section 3 of this Ordinance, authority to examine such person or to receive evidence;".

Since an accused person can refuse to be examined or to give evidence under his undoubted right to elect to venture only a statement from the dock or to remain silent, he cannot come within the definition of "witness" in this Ordinance. He may well be a witness on his own behalf but this is only to say that he is a competent witness but he is never a compellable witness. As a witness, he cannot be administered an oath or an affirmation if he chooses to make a statement from the dock, but what he says therefrom comes fairly and squarely within the definition of "evidence" in the Evidence Ordinance. There "evidence" is defined in section 3 as including:—

> "All statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence;".

Having regard to this definition, I must differ, however regrettably, from Smith J. and hold that a statement from the dock is evidence, evidence for what it is worth but nevertheless evidence which thereafter entitles the accused or his counsel to address the court: see *Lam Heng* v. *R.* [2]

Failure to afford accused or his counsel an opportunity to address the court has been held to be a serious irregularity entitling the accused to a retrial: *Mahinder Singh* v. *Public Prosecutor.* [3] However in this case, counsel for the defence had previously made an address to the court and if he had not been shut out, he would have, quite clearly merely repeated his address. The learned president, sessions court, had in his grounds of decision fully considered the previous address of counsel for the accused. Having regard to these circumstances, I am of the opinion that the irregularity in this trial is curable under the provisions of section 448 of the Criminal Procedure Code, no failure of justice having, in my view, been occasioned.

The appeal is dismissed, the convictions and sentences are confirmed.

Appeal dismissed.

Solicitors: *Lim, Lim & Oon.*

MUNAH v. FATIMAH

[O.C.J. (Raja Azlan Shah J.) August 16, 1967]

[Kota Bharu — Civil Suit No. 109 of 1965]

Land Laws — Sale — Agreement to sell land under expectancy of title — Equitable owner — Failure to transfer to — Limitation.

Practice and Procedure — Trial — Default of appearance — R.S.C. 1957, O. 36 r. 31.

The plaintiff in 1946 entered into an agreement with the defendant and her brother, who were the beneficiaries to the estate of one Hamat, to purchase a piece of *padi* land, which was registered in the name of the deceased, for a consideration of $500. She went into occupation of the said land and cultivated it with *padi* and had since reaped the economic crops and enjoyed possession and profit without hindrance from the beneficiaries for a period of 19 years. She had also paid the annual quit rents for the land. She had repeatedly asked the beneficiaries to take out letters of administration in respect of the deceased's estate so that they could transfer